Supreme Court, U.S.
FILED
JUL 14 2000
CLERK

(7)

No. 99-1863

In The

Supreme Court of the United States

ALLEN BREAUX
and
JOE AMBROGIO,

Petitioners,

v.

CITY OF GARLAND, TERRY HENSLEY
and RON HOLIFIELD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY

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REPLY

I. Both Respondents' and the Fifth Circuit's Description of the Retaliatory Employment Actions Suffered by Petitioners Ignores the Jury's Verdict and the Proper Standard of Review.

In their "Counterstatement," Respondents acknowledge that this case is "factually complex," and has been "dominated by disputes as to the conclusions to be drawn from those facts." (R. Br., 1). What they fail to acknowledge is that such factual disputes are to be resolved by the *jury*. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2110 (2000). And the jury in this case resolved those factual disputes in favor of the plaintiffs (now Petitioners) Breaux and Ambrogio. (R. Vol. 15: 1739-46). In deciding whether to nevertheless grant judgment as a matter of law to the losers at trial (Hensley and Holifield), the Fifth Circuit was required to draw all reasonable inferences in favor of Breaux and Ambrogio, and was not allowed to make credibility determinations or weigh the evidence. *Reeves*, 120 S. Ct. at 2110. This is because "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* Indeed, the Fifth Circuit was required to "disregard all evidence favorable to [Respondents Hensley and Holifield] that the jury was not required to believe." *Id.*

Respondent's "Counterstatement" presents a version of this case that the jury obviously rejected; it reweighs evidence and pays no heed to the standard of review. That it does little more than restate the Fifth Circuit's own recharacterization of the evidence reveals how patently the Fifth Circuit substituted its own judgment for that of the jury, the same way that it impermissibly had done in *Reeves*. *See id.* Not only did the Fifth Circuit generally put its own "spin" on the evidence, but its version especially diminished the severity of the retaliation suffered by Breaux and Ambrogio, as well as the maliciousness of their supervisors' motives. In short, the

Fifth Circuit "rewrote" Petitioners' case, and Respondents now try to do the same.

According to the Fifth Circuit (and Respondents):

- The Internal Affairs charges brought against Breaux and Ambrogio were properly motivated (because Hensley honestly believed Breaux and Ambrogio were making false statements potentially harmful to their department) and not designed to punish them for their First Amendment activities (R. Br., 3-4);
- Even the obviously "trumped up" theft charge concerning the film in Holifield's surveillance camera was reasonable because Ambrogio knew about Holifield's hidden camera (App. 6 & n.4; R. Br., 4);
- The suspension of Breaux was just "administrative leave" (App. 16; R. Br., 5);
- The psychiatric examination of Breaux was motivated by his intemperate remarks, not by his report of improper political investigations (App. 7-8; R. Br., 5);
- The reprimands publicly announcing Hensley's findings that Breaux and Ambrogio were liars was simply a routine part of the Internal Affairs process, rather than a culmination of a "trumped up" process, with a preordained result, presided over by the person who was the subject of Breaux and Ambrogio's criticism (App. 16; R. Br., 5); and
- Hensley's threat to terminate Breaux and Ambrogio unless they signed humiliating and false confessions was just "hot air" and really no more than a "proposal" that they could keep their jobs if they made public retractions of their accusations (App. 20; R. Br., 5).

The Fifth Circuit's reassessment of the evidence makes the retaliation seem appropriate and even routine – so routine that several of the governmental actions at issue could not, under the Fifth Circuit's and Respondents' view, even be seen as "retaliatory." But the jury in this case, as was its prerogative, plainly drew different inferences from the conflicting evidence, finding that the challenged governmental actions were motivated by a

desire to punish plaintiffs for their First Amendment activities, were therefore "retaliatory" rather than routine (R. Vol. 15: 1739-46), and were sufficiently severe and malicious to justify substantial compensatory and punitive damages. (R. Vol. 15: 1755-56).

Given the jury verdict, it is the *Petitioners'* Statement of the Case that must be deemed controlling: it is the only statement that draws inferences favorable to the trial victors, as this Court's recent decision in *Reeves* commands. Thus, as summarized at page 20-21 of the Petition for Writ of Certiorari, the jury reasonably could have found that Officer Breaux and Detective Ambrogio were the targets of an ill-motivated and severe campaign of retaliatory harassment orchestrated by the very individuals whom the officers had truthfully accused of abusing their power.

II. The Issue of Whether the Governmental Retaliation Was Sufficiently Severe to Result in Actionable First Amendment Injury Was Preserved Below.

In an effort to pretermit this Court's review of the serious constitutional issue posed by this case, Respondents contend that Petitioners have somehow "waived" their ability to make the arguments propounded in their Petition. (R. Br., 9-12). The issue, however, *was* raised in the Fifth Circuit – by Respondents – who claimed an absence of any retaliatory adverse employment action that was sufficiently severe to inflict actionable First Amendment injury. (Brief of Appellant Holifield, 43-44; Brief of Appellant Hensley, 50-54). Petitioners then joined issue in their Fifth Circuit brief. (Brief of Appellees Breaux and Ambrogio, 49-58). And the Fifth Circuit ruled in Respondents' favor on precisely that point. App. 14-22, 32. Thus, the relevant issue was indeed "raised," "considered," and "resolved" by the Court of Appeals, as required by the precedents quoted by Respondents. (*See* R. Br., 10, 12).

Fatal to Respondents' waiver argument is that waiver extends to *issues*, not phraseology or cases. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("issues"); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("issues"). Thus, even though Breaux and Ambrogio did not use the *Rutan* case, or the phrase "reasonably chilling," in support of their Fifth Circuit argument, nothing prohibits parties from using phrases or cases in this Court that they have not used below. The obligation to preserve *issues* is to give a court a fair opportunity to decide the issue correctly, not to winnow the number of cases (or words) that later can be marshalled in support of a party's argument that the issue ultimately was decided incorrectly. In the present case, there is simply no doubt that Petitioners have consistently argued throughout this litigation that they suffered retaliation, though short of actual discharge, that was so severe that it inflicted actionable First Amendment injury. (Brief of Appellees Breaux and Ambrogio, 49-58).

Further, Petitioners did not complain about the relevant jury instruction because there was no reason to do so. That instruction, as distinct from the Fifth Circuit's restrictive "short list" analysis, was not rigidly underinclusive in identifying potential sources of First Amendment injury. Rather, the relevant jury instruction informed the jury that:

> To prove an adverse employment action such as retaliation or discrimination, a plaintiff need not show that he was discharged, turned down for a promotion, or denied other employment benefits such as increased pay. An adverse employment action may consist of such things as a reprimand or other disciplinary action, an assignment to less a prestigious position, to less desirable working hours, or to less interesting work, or the threat to terminate the person's employment.

(R. 1742-43). Because this instruction is sufficiently flexible to permit a jury to make an "adverse employment action" finding in any case in which First Amendment injury

exists, the instruction clearly did not contain the constitutional flaw of which Petitioners complain. It is instead the Fifth Circuit's ruling that employs an analysis that will inevitably result, as it did in this case, in First Amendment injury going unremedied. Consequently, it is the Fifth Circuit's constitutional error to which the Petition for Writ of Certiorari is addressed.

III. The Fifth Circuit's Approach is Patently Inconsistent with *Rutan*.

According to Respondents, the Fifth Circuit's rigid approach is perfectly consistent with this Court's precedent, primarily because *Rutan* provides an illustrative list of retaliatory employment actions capable of inflicting First Amendment injury. (R. Br., 13-14). Under *Rutan*, however, there is a fundamental difference between 1) an illustrative list of retaliatory employment actions that have an inhibiting effect on First Amendment activities, but which does not arbitrarily preclude a governmental employee from demonstrating that other *unlisted* retaliatory actions have caused the same injurious "chilling" effect; and 2) an inflexible, exclusive list of retaliatory actions that forecloses recovery for any form of retaliation not on the list, regardless of whether those unlisted actions produce an inhibited employment environment antithetical to the First Amendment. *See* 497 U.S. at 75, 79. The former approach is sufficiently flexible to accurately identify First Amendment injury when it is present; the latter approach is rigidly narrow and underinclusive in identifying injury of First Amendment magnitude. The former approach is the one prescribed by *Rutan*; the latter is the one employed by the Fifth Circuit.[1]

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[1] Even Respondents acknowledge the Fifth Circuit's inflexibility. (R. Br., 24). Indeed, the Fifth Circuit in the present case reiterated its "narrow view of what constitutes an adverse employment action." App. 15. Nevertheless, Respondents argue that there is no basis for saying that the Fifth Circuit has

The Fifth Circuit's opinion in *Breaux*, in sharp contrast to *Rutan*, does not even go through the pretense of attempting to identify retaliatory conduct that has the effect of inflicting First Amendment injury – *i.e.*, retaliation that reasonably would be expected to inhibit (or "chill") First Amendment activities. Indeed, the Fifth Circuit expressly rejected such a standard. App. 15. Moreover, as Respondents' own characterization of the *Breaux* opinion confirms (*see* R. Br., 8-9), the Fifth Circuit's inflexible list of actionable forms of retaliation is not a means to a constitutionally acceptable end (*i.e.*, an attempt to identify actions that reasonably inhibit speech), but is an end in itself – an unconstitutional end when applied to deprive public employees of a cause of action even when the retaliation plainly has penalized and inhibited their First Amendment activities.

Respondents' attempt to reconcile *Breaux* with this Court's decision in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), is also flawed. According to Respondents, *Treasury Employees* focused on whether the particular employment action in that case would "unduly inhibit" First Amendment activities rather than on "chilling effects." (R. Br., 17-18). But "inhibiting" and "chilling" are synonymous. Whether the "adverse employment action" inquiry is couched in terms of "unduly inhibiting" or "reasonably chilling" is not significant. The Fifth Circuit's approach is constitutionally deficient not because of semantics, but because it does not do what this Court in *Treasury Employees* plainly requires – objectively determine whether the particular employment action(s) would reasonably cause First Amendment damage by inhibiting (or

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authoritatively committed to a closed list of actionable adverse employment actions. (R. Br., 24) (citing only a case that *refused* to expand the list). But the question in this case is not whether the Fifth Circuit's rigid short list is incapable of future expansion, but whether its use of that list already operates to arbitrarily deny a cause of action to public employees who, as here, have suffered First Amendment injury.

"chilling") public employees' First Amendment activities. 513 U.S. at 468-69.[2]

In sum, any approach that would routinely and categorically treat numerous forms of retaliation to be incapable of inflicting First Amendment injury as a matter of law, without any particularized assessment of the inhibiting effect of those forms of retaliation, is flatly inconsistent with *Rutan*. *See* 497 U.S. at 75, 79. The Fifth Circuit's analysis in *Breaux* not only elevates form over substance, it also provides an invidious blueprint that tells government employers precisely how far they can go to penalize and inhibit employee speech on matters of public concern without incurring liability. Such an approach cannot be reconciled with the First Amendment scrutiny this Court applied in *Rutan* and *Treasury Employees*.

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[2] Respondents also cite Title VII cases in support of the legitimacy of the Fifth Circuit's approach to this First Amendment issue. (R. Br., 15 n.7). Although Title VII generally contains a "tangible employment action" requirement, that requirement does not apply to hostile work environment claims, which may be based on "severe or pervasive" harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). Moreover, it is far from clear that the "tangible employment action" requirement applies to Title VII retaliation claims, especially when the employee is subjected to severe or persuasive retaliatory harassment by a supervisor. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792-93 (6th Cir. 2000). Indeed, even those courts requiring an adverse employment action in Title VII retaliation cases emphasize that the requirement should not be rigidly or arbitrarily applied. *See, e.g., Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit."). Thus, in the two Title VII contexts most analogous to First Amendment retaliation cases – hostile work environment cases and retaliation cases – Respondents' claims about Title VII's "tangible employment action" requirement are simply not correct.

IV. No Other Circuit Employs a Standard That Inevitably Deprives Public Employees of a Remedy Even Though They Have Suffered Clear First Amendment Injury.

Respondents try to make the circuit split disappear in much the same way they attempt to make the inconsistency with *Rutan* disappear – by arguing that *Breaux* is just the Fifth Circuit's unique (and more specific) way of identifying those retaliatory actions having the reasonable capacity to inhibit employees' First Amendment activity. Once again, the Fifth Circuit's own language in *Breaux* is fatal to this rationalization. The only instance in which *Breaux* pays even lip service to the chilling of First Amendment activity is when *Breaux* expressly rejects its legal significance. App. 15. No other circuit so casually disregards the very essence of First Amendment injury.

Every other circuit ultimately focuses on the *effect* rather than merely on the *form* of the retaliation. *See* Petition, 22-24. Although every circuit recognizes, as this Court did in *Rutan*, that some retaliatory actions are so severe that they result in First Amendment injury as a matter of law – *e.g.*, termination, demotion – no other circuit exhibits the Fifth Circuit's hypermechanical rigidity in identifying retaliation that is *insufficient* as a matter of law to cause First Amendment injury. In the Fifth Circuit, the retaliation is either an adverse employment action as a matter of law (if it is on "the list") or it is legally insufficient to inflict First Amendment injury (if it is not on "the list"); no other circuit leaves so little room for a jury to assess the severity of the retaliation. Indeed, no other circuit has held a campaign of retaliation as severe as the one in *Breaux* to be insufficient as a matter of law to inflict First Amendment injury.[3]

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[3] Similarly, no other circuit has followed the Fifth Circuit in holding that a threat of discharge is legally insufficient to constitute actionable retaliation. *See, e.g., Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999) (threats of dismissal

Respondents nevertheless argue that the Fifth Circuit is in line with those circuits applying the "reasonably chilling" standard, contending that those circuits are condemning retaliatory actions "different in kind" from those the Fifth Circuit has ruled too trivial to inflict First Amendment injury. (Br., 25 & n.11). But many of the cases they cite condemn retaliation far less severe than that involved in *Breaux*, and far less severe than forms of retaliation that the Fifth Circuit routinely holds insufficiently adverse as a matter of law. For example, in *Allen v. Scribner*, 812 F.2d 426, 428-29 (9th Cir. 1987), a researcher was removed from a research project; in *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994), an employee was required to undergo duplicate testing procedures before securing her promotion; in *Bloch v. Ribar*, 156 F.3d 673, 678-79 (6th Cir. 1998), the retaliation consisted of the public disclosure of embarassing personal information; and in *Suppan v. Dadonna*, 203 F.3d 228, 234-35 (3rd Cir. 2000), an employee received low evaluations that, contrary to Respondents' reading of *Suppan*, could not even be shown to have caused a loss of promotion. Although the retaliation in *Allen*, *Tao*, *Bloch* and *Suppan* may be "different in kind" from trumped up charges, lengthy interrogations, one-sided investigations, biased adjudicatory proceedings, public reprimands, compelled psychological testing, suspension, and threats of discharge, it is irreconcilable that the employees in *Allen*, *Tao*, *Bloch* and *Suppan* had a cause of action, but Breaux and Ambrogio do not.

In the final analysis, by characterizing retaliatory employment actions as either actionable as a matter of law or inactionable as a matter of law, the Fifth Circuit

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are a potent means of inhibiting speech) (citing and quoting three Supreme Court cases). Indeed, by requiring that a threat of discharge be acted on, and become an actual discharge before a public employee has a cause of action, the Fifth Circuit ignores even the very holding of *Rutan*.

has effectively removed the issue of First Amendment injury from the jury. In virtually any case, the Fifth Circuit is able to recast as a question of law an issue that other circuits largely entrust to the jury. *See, e.g., Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (whether campaign of retaliatory harassment reaches the threshold of actionability is a question of fact for the jury); *Bloch*, 156 F.3d at 679 (6th Cir. 1998) (same); *Suppan*, 203 F.3d at 235 (3rd Cir. 2000) (same); *Allen*, 812 F.2d at 434 n.17 (9th Cir. 1987) (same). Thus, one of the most troubling aspects of the Fifth Circuit's approach is how it fosters judicial overreaching. Because the *form* of retaliation is determinative, the Fifth Circuit's own characterization of the challenged employment action effectively dictates the outcome, in utter defiance of the deference due the jury. Thus, as in the present case, an actionable "suspension" can become an inactionable "administrative leave," an actionable "public reprimand" can become an inactionable "rescinded reprimand," and an actionable "threat of termination" can become constitutionally insignificant "hot air."

Petitioners respectfully urge the Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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